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Letter dated 5 January 2004 from the Permanent Representative of Honduras to the United Nations addressed to the President of the Security Council

On instructions from my Government, I have the honour to transmit the Application for the revision of the Judgment of 11 September 1992 in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v. Honduras)* dated 18 September 2003.

I request you to have it circulated as a document of the Security Council, and attach an original copy in English of the Judgment of the International Court of Justice (see annex).

(*Signed*) Manuel **Acosta Bonilla**
Ambassador
Permanent Representative

04-21358 (E) 030204 050204

Annex to the letter dated 5 January 2004 from the Permanent Representative of Honduras to the United Nations addressed to the President of the Security Council

[Original: French and English]

INTERNATIONAL COURT OF JUSTICE

YEAR 2003

2003
18 December
General List
No. 127

18 December 2003

APPLICATION FOR REVISION OF THE JUDGMENT OF 11 SEPTEMBER 1992 IN THE CASE CONCERNING THE *LAND, ISLAND AND MARITIME FRONTIER DISPUTE (EL SALVADOR/HONDURAS: NICARAGUA INTERVENING)*

(EL SALVADOR *v.* HONDURAS)

Article 61 of the Statute — Application for revision — Possibility for the Court at any time to require previous compliance with the terms of the judgment whose revision is sought, before it admits proceedings in revision — No role played by the consent of the parties as to admissibility of an application for revision.

New facts alleged by El Salvador in respect of the sixth sector of the land boundary between El Salvador and Honduras established in the Chamber's Judgment of 11 September 1992: avulsion of the river Goascorán; discovery of a further copy of the "Carta Esférica" and of the report of the El Activo *expedition in 1794 — Legal basis of the Chamber's decision in the original case — Alleged new facts not decisive factors in respect of the 1992 Judgment — No need to ascertain whether the other conditions laid down in Article 61 of the Statute are satisfied — Inadmissibility of the Application.*

JUDGMENT

Present: *Judge* GUILLAUME, *President of the Chamber*; *Judges* REZEK, BUERGENTHAL; *Judges* ad hoc TORRES BERNÁRDEZ, PAOLILLO; *Registrar* COUVREUR.

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* This annexed application is rendered by the Court in English and French only.

In the case concerning the Application for revision of the Judgment of 11 September 1992,

between

the Republic of El Salvador,

represented by

Mr. Gabriel Mauricio Gutiérrez Castro,

as Agent;

H.E. Ms María Eugenia Brizuela de Ávila, Minister for Foreign Affairs,

H.E. Mr. Rafael Zaldívar Brizuela, Ambassador of El Salvador to the International Organizations in The Hague,

as Co-Agents;

Mr. Augustín Vásquez Gómez,

as Deputy Agent;

Mr. Antonio Remiro Brotóns, Professor of International Law, Universidad Autónoma de Madrid,

Mr. Maurice Mendelson, Q.C., Professor Emeritus of International Law, University of London,

as Counsel and Advocates;

Mr. Mauricio Alfredo Clará,

Mr. Domingo E. Acevedo,

as Counsel;

Ms Beatriz Borja de Miguel,

Ms Patricia Kennedy,

Ms Ana Mogorrón Huerta,

as Advisers;

Mr. César Martínez,

Ms Lilian Overdiek,

Ms Cecilia Montoya de Guardado,

as Assistants;

and

the Republic of Honduras,

represented by

H.E. Mr. Carlos López Contreras, former Minister for Foreign Affairs,

as Agent;

H.E. Mr. Julio Rendón Barnica, Ambassador of Honduras to the Netherlands,

as Co-Agent;

Mr. Pierre-Marie Dupuy, Professor of International Law, Université de Paris (Panthéon-Assas) and Institut universitaire européen de Florence,

Mr. Luis Ignacio Sánchez Rodríguez, Professor of International Law, Universidad Complutense de Madrid,

Mr. Philippe Sands, Q.C., Professor of Law, University College London,

Mr. Carlos Jiménez Piernas, Professor of International Law, Universidad de Alcalá, Madrid,

Mr. Richard Meese, avocat à la cour d'appel de Paris,

as Counsel and Advocates;

H.E. Mr. Aníbal Quiñónez Abarca, Deputy Minister for Foreign Affairs,

H.E. Mr. Policarpo Callejas, Ambassador, Adviser to the Ministry of Foreign Affairs,

Mr. Miguel Tosta Appel, Chairman of the Honduran National Section of the El Salvador-Honduras Demarcation Commission,

as Counsel,

THE CHAMBER OF THE INTERNATIONAL COURT OF JUSTICE formed to deal with the above-mentioned case,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 10 September 2002 the Republic of El Salvador (hereinafter "El Salvador") filed in the Registry of the Court an Application instituting proceedings dated the same day, whereby, citing Article 61 of the Statute and Articles 99 and 100 of the Rules of Court, it submitted a request to the

Court for revision of the Judgment delivered on 11 September 1992 by the Chamber of the Court formed to deal with the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (*I.C.J. Reports 1992*, p. 351).

2. Pursuant to Article 40, paragraph 2, of the Statute, the Registrar communicated a certified copy of the Application to the Republic of Honduras (hereinafter "Honduras") on 10 September 2002. A copy of the Application was also communicated to the Republic of Nicaragua for information purposes, since that State had been authorized, pursuant to Article 62 of the Statute, to intervene in the original proceedings. In accordance with Article 40, paragraph 3, of the Statute, all States entitled to appear before the Court were notified of the Application.

3. In its Application, El Salvador, citing Article 100, paragraph 1, of the Rules of Court, requested the Court "To proceed to form the Chamber that will hear the application for revision of the Judgment, bearing in mind the terms that El Salvador and Honduras agreed upon in the Special Agreement of 24 May 1986."

4. The Parties, duly consulted by the President of the Court on 6 November 2002, expressed their wish for the formation of a new chamber of five members, of whom two would be judges *ad hoc* to be chosen by them pursuant to Article 31, paragraph 3, of the Statute. By a letter of 7 November 2002 the Agent of El Salvador informed the Court that his Government had chosen H.E. Mr. Felipe H. Paolillo to sit as judge *ad hoc*; and by a letter of 18 November 2002 the Agent of Honduras informed the Court that his Government had chosen Mr. Santiago Torres Bernárdez to sit as judge *ad hoc*.

5. By an Order of 27 November 2002 the Court, acting pursuant to Article 26, paragraph 2, of the Statute and Article 17 of the Rules of Court, decided to accede to the request of the Parties that a special chamber be formed to deal with the case; it declared that, at an election held on 26 November 2002, President Guillaume and Judges Rezek and Buergenthal had been elected to form a chamber to deal with the case, together with the above-named judges *ad hoc*, stating further that the said chamber as so composed had accordingly been duly constituted pursuant to that Order. In accordance with Article 18, paragraph 2, of the Rules of Court, Judge Guillaume, who held the office of President of the Court when the Chamber was formed, was to preside over the Chamber.

6. By the same Order, the Court, acting pursuant to Articles 92, paragraph 2, and 99, paragraph 2, of the Rules of Court, fixed 1 April 2003 as the time-limit for the filing of Written Observations by Honduras on the admissibility of the Application, and reserved the subsequent procedure for further decision.

7. On 1 April 2003, within the time-limit fixed, Honduras filed in the Registry its Written Observations on the admissibility of El Salvador's Application.

8. In a letter of 8 April 2003 the Agent of El Salvador, referring to the Written Observations of Honduras, contended that the latter had submitted new documents with corresponding arguments, and that these required a response from El Salvador, accompanied by the necessary

documents, and to that end requested authorization for his Government to submit new documents. In a letter of 24 April 2003 the Co-Agent of Honduras opposed that request. Following a meeting held by the President of the Chamber with the Parties' Agents on 28 April 2003, the Chamber decided that the filing of additional written pleadings was not necessary in the circumstances, that the written proceedings were accordingly closed, and that, if El Salvador wished to submit new documents, its request would then be considered in accordance with the procedure laid down in Article 56 of the Rules of Court. The Registrar advised the Parties of this decision by letters dated 8 May 2003.

9. By a letter of 23 June 2003 El Salvador sought authorization to produce new documents pursuant to Article 56 of the Rules of Court. Those documents, having been filed in the Registry that same day, were transmitted to Honduras in accordance with paragraph 1 of that Article. By a letter of 10 July 2003 Honduras informed the Chamber that it objected to the production of those documents. El Salvador and Honduras were authorized to submit further observations on the matter, which they did by letters of 17 and 24 July 2003 respectively. After examining the views thus expressed by the Parties, the Chamber decided, in accordance with Article 56, paragraph 2, of the Rules of Court, to authorize the production of only some of the documents submitted by El Salvador. The Chamber further noted that a new document attached by Honduras to its Observations of 10 July 2003 was admissible only if authorized pursuant to the same provision of the Rules, and decided not to authorize its production. By letters of 29 July 2003, the Deputy-Registrar informed the Parties of these decisions, advising them that, pursuant to Article 56, paragraph 3, Honduras was authorized to comment by not later than 19 August 2003 on the documents which the Chamber had authorized El Salvador to produce, and to submit documents in support of its comments. On 19 August 2003, within the time-limit thus fixed, Honduras filed its comments in the Registry together with four supporting documents.

10. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Chamber, having ascertained the views of the Parties, decided to make accessible to the public, with effect from the opening of the oral proceedings, copies of Honduras's Written Observations on the admissibility of El Salvador's Application and of the documents annexed to those Observations, together with all new documents subsequently produced by the Parties with the Chamber's authorization.

11. Public sittings were held on 8, 9, 10 and 12 September 2003, at which the Chamber heard the oral arguments and replies of:

For El Salvador: H.E. Ms María Eugenia Brizuela de Ávila,
Mr. Maurice Mendelson,
Mr. Antonio Remiro Brotóns,
Mr. Gabriel Mauricio Gutiérrez Castro.

For Honduras: H.E. Mr. Carlos López Contreras,
Mr. Pierre-Marie Dupuy,
Mr. Carlos Jiménez Piernas,
Mr. Richard Meese,
Mr. Luis Ignacio Sánchez Rodríguez,
Mr. Philippe Sands.

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12. In its Application, El Salvador made the following requests:

"For all the foregoing reasons, the Republic of El Salvador requests the Court:

(a) To proceed to form the Chamber that will hear the application for revision of the Judgment, bearing in mind the terms that El Salvador and Honduras agreed upon in the Special Agreement of 24 May 1986;

(b) To declare the application of the Republic of El Salvador admissible on the grounds of the existence of new facts of such a character as to lay the case open to revision under Article 61 of the Statute of the Court; and

(c) Once the application is admitted, to proceed to the revision of the Judgment of 11 September 1992, so that a new Judgment will determine the boundary line in the sixth disputed sector of the land frontier between El Salvador and Honduras to be as follows:

> 'Starting from the old mouth of the Goascorán river in the inlet known as the La Cutú Estuary situated at latitude 13° 22' 00" N and longitude 87° 41' 25" W, the frontier follows the old course of the Goascorán river for a distance of 17,300 meters as far as the place known as the Rompición de los Amates situated at latitude 13° 26' 29" N and longitude 87° 43' 25" W, which is where the Goascorán river changed its course.'."

13. In its Written Observations, Honduras made the following submission:

"In view of the facts and arguments presented above, the Government of the Republic of Honduras requests the Chamber to declare inadmissible the Application for revision presented on 10 September 2002 by El Salvador."

14. At the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Government of the Republic of El Salvador,

"The Republic of El Salvador respectfully requests the Chamber, rejecting all contrary claims and submissions to adjudge and declare that:

1. The application of the Republic of El Salvador is admissible based on the existence of new facts of such a nature as to leave the case open to revision, pursuant to Article 61 of the Statute of the Court, and

2. Once the request is admitted that it proceed to a revision of the Judgment of 11 September 1992, so that a new judgment fixes the boundary line in the sixth disputed sector of the land boundary between El Salvador and Honduras as follows:

> 'Starting at the old mouth of the Goascorán River at the entry point known as the Estero de la Cutú, located at latitude 13 degrees 22 minutes 00 seconds north and longitude 87 degrees 41 minutes 25 seconds west, the border follows the old bed of the Goascorán River for a distance of 17,300 metres up to the place known as Rompición de Los Amates, located at latitude 13 degrees 26 minutes 29 seconds north and longitude 87 degrees 43 minutes 25 seconds west, which is where the Goascorán River changed course.'."

On behalf of the Government of the Republic of Honduras,

"In view of the facts and arguments presented above, the Government of the Republic of Honduras requests the Chamber to declare the inadmissibility of the Application for Revision presented on 10 September 2002 by El Salvador."

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* *

15. By a Judgment of 11 September 1992, the Chamber of the Court formed to deal with the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* decided the course of the land boundary between El Salvador and Honduras in six disputed sectors of that boundary. By the same Judgment the Chamber settled the dispute between the Parties over the legal status of various islands in the Gulf of Fonseca and the legal status of waters in the Gulf and outside it.

16. El Salvador has submitted an Application to the Court for revision of the 1992 Judgment in respect of the sixth sector of the land boundary, lying between Los Amates and the Gulf of Fonseca. During the original proceedings, it was the contention of Honduras that in that sector "the boundary . . . follows the present stream [of the River Goascorán], flowing into the Gulf north-west

of the Islas Ramaditas in the Bay of La Unión". El Salvador however claimed that the boundary was defined by "a previous course followed by the river . . . and that this course, since abandoned by the stream, can be traced, and it reaches the Gulf at Estero La Cutú" (Judgment, para. 306). In the Judgment revision of which is now sought, the Chamber unanimously upheld the submissions of Honduras (*ibid.*, paras. 321, 322 and 430).

17. In its Application for revision of the 1992 Judgment, El Salvador relies on Article 61 of the Statute, which provides:

> "1. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.
>
> 2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.
>
> 3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.
>
> 4. The application for revision must be made at latest within six months of the discovery of the new fact.
>
> 5. No application for revision may be made after the lapse of ten years from the date of the judgment."

18. Article 61 provides for revision proceedings to open with a judgment of the Court declaring the application admissible on the grounds contemplated by the Statute; Article 99 of the Rules of Court makes express provision for proceedings on the merits if, in its first judgment, the Court has declared the application admissible.

Thus the Statute and the Rules of Court foresee a "two-stage procedure". The first stage of the procedure for a request for revision of the Court's judgment should be "limited to the question of admissibility of that request" (*Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 197, paras. 8 and 10; *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment,* 3 February 2003, para. 15).

19. Therefore, at this stage, the present Chamber's decision is limited to the question whether El Salvador's request satisfies the conditions contemplated by the Statute. Under Article 61, these conditions are as follows:

(a) the application should be based upon the "discovery" of a "fact";

(b) the fact the discovery of which is relied on must be "of such a nature as to be a decisive factor";

(c) the fact should have been "unknown" to the Court and to the party claiming revision when the judgment was given;

(d) ignorance of this fact must not be "due to negligence"; and

(e) the application for revision must be "made at latest within six months of the discovery of the new fact" and before ten years have elapsed from the date of the judgment.

20. The Chamber observes lastly that "an application for revision is admissible only if each of the conditions laid down in Article 61 is satisfied. If any one of them is not met, the application must be dismissed." (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment,* 3 February 2003, para. 17.)

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21. However, El Salvador appears to argue *in limine* that there is no need for the Chamber to consider whether the conditions of Article 61 of the Statute have been satisfied. According to the Applicant,

> "Honduras implicitly acknowledged the admissibility of El Salvador's Application when, by letter dated 29 October 2002, it informed the distinguished President of the Court that, pursuant to Article 61, paragraph 3, of the Statute, it would ask that the Court require previous compliance with the 1992 Judgment as a condition precedent to the admissibility of the Application for revision."

In El Salvador's view, "The back step that Honduras took with its letter of 24 July 2003", by which it decided not to ask for prior compliance with the judgment, "does nothing to diminish [the] acknowledgment [of the admissibility of the Application], and instead serves to confirm it". The Chamber is consequently requested to "adjudge and decide accordingly".

22. The Chamber observes first that, in its letter of 29 October 2002, Honduras informed the President of the Court that it would "request that the Court make the admission of the proceedings in revision conditional on previous compliance with the judgment" and that accordingly it would "submit a formal petition" to that effect. However, Honduras never submitted that request and stated in its observations of 24 July 2003 (see paragraph 9 above) that it had "decided, on reflection, not to ask the Chamber to require prior compliance with the terms of the Judgment". Thus, Honduras's conduct cannot be construed as implying a tacit acceptance of the admissibility of El Salvador's Application for revision.

Further, paragraph 3 of Article 61 of the Statute and paragraph 5 of Article 99 of the Rules of Court afford the Court the possibility at any time to require previous compliance with the terms of the judgment whose revision is sought, before it admits proceedings in revision; accordingly, even if Honduras had submitted a request to the Court to require previous compliance without awaiting the Chamber's decision on the admissibility of El Salvador's Application, the request would not have implied recognition of the admissibility of the Application.

Finally, the Chamber notes that, regardless of the parties' views on the admissibility of an application for revision, it is in any event for the Court, when seised of such an application, to ascertain whether the admissibility requirements laid down in Article 61 of the Statute have been met. Revision is not available simply by consent of the parties, but solely when the conditions of Article 61 are met.

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23. In order properly to understand El Salvador's present contentions, it is necessary to recapitulate at the outset part of the reasoning in the 1992 Judgment in respect of the sixth sector of the land boundary.

El Salvador admitted before the Chamber hearing the original case that the river Goascorán had been adopted as the provincial boundary during the period of Spanish colonization. It argued, however, that

> "at some date [the Goascorán] abruptly changed its course to its present position. On this basis El Salvador's argument of law [was] that where a boundary is formed by the course of a river, and the stream suddenly leaves its old bed and forms a new one, this process of 'avulsion' does not bring about a change in the boundary, which continues to follow the old channel." (Para. 308.)

That was claimed to be the rule under both Spanish colonial law and international law. Thus, according to El Salvador, the boundary between the two States should be established not along the present stream of the river, flowing into the Bay of La Unión, but along the "previous course . . . since abandoned by the stream", probably during the seventeenth century, emptying into the Estero La Cutú (paras. 306 and 311).

24. After setting out this argument by El Salvador, the Chamber stated in its Judgment of 11 September 1992 that "No record of such an abrupt change of course having occurred has been brought to the Chamber's attention" (para. 308). It added: "were the Chamber satisfied that the river's course was earlier so radically different from its present one, then an avulsion might reasonably be inferred" (para. 308). The Chamber observed, however, that: "There is no scientific evidence that the previous course of the Goascorán was such that it debouched in the Estero La Cutú" or in another neighbouring inlet (para. 309). It did not take a position on the consequences that any avulsion, occurring before or after 1821, would have had on provincial boundaries, or boundaries between States, under Spanish colonial law or international law.

The Chamber went on to find that "any claim by El Salvador that the boundary follows an old course of the river abandoned at some time *before* 1821 must be rejected. It is a new claim and inconsistent with the previous history of the dispute." (Para. 312.) In this regard, the Chamber noted *inter alia* that on several occasions, including in particular during the Saco negotiations between the two States in 1880, El Salvador had adopted conduct excluding any "claim . . . that the 1821 boundary was not the 1821 course of the river, but an older course, preserved as provincial boundary by a provision of colonial law" (para. 312).

The Chamber then considered "the evidence made available to it concerning the course of the river Goascorán in 1821" (para. 313). It examined in particular a "chart (described as a 'Carta Esférica') of the Gulf of Fonseca prepared by the captain and navigators of the brig or brigantine *El Activo*, who sailed in 1794, on the instructions of the Viceroy of Mexico, to survey the Gulf" (para. 314). It noted that the mouth of the Goascorán on that chart was "quite inconsistent with the old course of the river alleged by El Salvador, or, indeed, any course other than the present-day one" (para. 314). The Chamber concluded that "the report of the 1794 expedition and the 'Carta Esférica' leave little room for doubt that the river Goascorán in 1821 was already flowing in its present-day course" (para. 316).

Finally, after having examined various other arguments by El Salvador which it is not necessary to repeat here, the Chamber "found that the boundary follows the present course of the Goascorán" (para. 319) and defined the boundary line in the mouth of the river (paras. 320-322).

* *

25. In its Application for revision, El Salvador, acting under Article 61 of the Statute, relies on facts which it considers to be new within the meaning of that Article; those facts relate, on the one hand, to the avulsion of the river Goascorán and, on the other, to the "Carta Esférica" and the report of the 1794 *El Activo* expedition.

* *

26. El Salvador first claims to possess scientific, technical and historical evidence showing, contrary to what it understands the decision of the Chamber to have been, that the Goascorán did in the past change its bed, and that the change was abrupt, probably as a result of a cyclone in 1762.

In support of this contention El Salvador submits to the Chamber a report dated 5 August 2002 entitled Geologic, Hydrologic and Historic Aspects of the Goascorán Delta — A Basis for Boundary Determination. It also produces a study it conducted in 2002 "to check for the presence of vestiges of the Goascorán's original riverbed and additional information about its hydrographic behaviour". Finally, it refers to various publications, including in particular *Geografía de Honduras* by Ulises Meza Cálix, published in 1916, and *Monografía del Departamento de Valle*, prepared under the direction of Bernardo Galindo y Galindo and published in 1934.

27. El Salvador argues that evidence can constitute "new facts" for purposes of Article 61 of the Statute. In this regard it relies on the *travaux préparatoires* of the provision of the Statute of the Permanent Court of International Justice, on which Article 61 is modelled, which are said to confirm that a document can be considered to be a "new fact". It also invokes an arbitral award handed down on 7 August and 25 September 1922 by the Franco-German Mixed Arbitral Tribunal in the *Heim et Chamant c. Etat allemand* case, which, in El Salvador's view, recognized that evidence can constitute "a fact".

El Salvador further contends that the evidence it is now offering establishes the existence of an old bed of the Goascorán debouching in the Estero La Cutú, and the avulsion of the river in the mid-eighteenth century or that at the very least, it justifies regarding such an avulsion as plausible. These are said to be "new facts" for purposes of Article 61.

28. The facts thus set out are, according to El Salvador, decisive. It maintains that the considerations and conclusions of the 1992 Judgment are founded on the rejection of an avulsion which, in the Chamber's view, had not been proved: that avulsion has ceased to be a matter of conjecture — it is an established fact which actually occurred. On the basis of Spanish colonial law, the provincial boundaries remained unchanged, notwithstanding the avulsion, until 1821. El Salvador concludes that, contrary to what the Chamber held in 1992, the boundary arising from the *uti possidetis juris* should accordingly follow those boundaries and not the new course of the Goascorán.

29. El Salvador finally maintains that, given all the circumstances of the case, in particular the "bitter civil war [which] was raging in El Salvador" "for virtually the whole period between 1980 and the handing down of the Judgment on 11 September 1992", its ignorance of the various new facts which it now advances concerning the course of the Goascorán was not due to negligence.

In particular, it states that the scientific and technical studies it has produced could not have been carried out previously, given both the state of science and technology in 1992, and the political situation prevailing at the time in the sixth sector of the boundary and, generally, in El Salvador and the region. As for the publications mentioned above (see paragraph 26), El Salvador contends that it could not have "access to the documents in Honduras's National Archives and, despite all its efforts, could not locate them in the archives of other States to which it did have access".

30. El Salvador concludes from the foregoing that, as the various conditions laid down by Article 61 of the Statute are satisfied, the Application for revision founded on the avulsion of the river Goascorán is admissible.

31. Honduras, for its part, argues that with regard to the application of Article 61 of the Statute, it is "well-established case law that there is a distinction in kind between the facts alleged and the evidence relied upon to prove them and that only the discovery of the former opens a right to revision". It quotes in this connection the Advisory Opinion rendered on 4 September 1924 by

the Permanent Court of International Justice concerning the question of the *Monastery of Saint-Naoum*. According to Honduras, a "fact" cannot "include evidentiary material in support of an argument, or an assertion, or an allegation". Accordingly, the evidence submitted by El Salvador cannot open a right to revision.

Honduras adds that El Salvador has not demonstrated the existence of a new fact discovered by El Salvador since 1992 "which establishes that the Goascorán River previously ran in a former bed which debouched at Estero La Cutú or that a process of 'avulsion' occurred, or that it occurred on a particular date". In reality, El Salvador is seeking "a new interpretation of previously known facts" and asking the Chamber for a "genuine reversal" of the 1992 Judgment.

32. Honduras further maintains that the facts relied on by El Salvador, even if assumed to be new and established, are not of such a nature as to be decisive factors in respect of the 1992 Judgment. According to Honduras, "the material presented by El Salvador on that subject is irrelevant to the operative factual determination" made at that time by the Chamber. That decision is alleged to have been founded solely on the finding of fact that "from 1880, during the Saco negotiations, until 1972 El Salvador had treated the boundary as being based on the 1821 course of the river". The Chamber is said to have acted on that basis alone when in paragraph 312 of its Judgment it rejected El Salvador's claim "that the boundary follows an old course of the river abandoned at some time *before* 1821", considering it to be "a new claim and inconsistent with the previous history of the dispute". Thus, according to Honduras, it does not matter whether or not there was avulsion: avulsion is irrelevant to the *ratio decidendi* of the Chamber.

33. Honduras argues lastly that El Salvador's ignorance in 1992 of the facts on which it is relying in the present proceedings in support of its theory of avulsion was due to negligence. El Salvador has "never proved that it exhausted — or even initiated — means that would have given it diligent knowledge of the facts that it is alleging today". In Honduras's view, El Salvador could have had the scientific and technical studies and historical research which it is now relying on carried out before 1992.

34. Honduras concludes from the foregoing that, as the various conditions laid down by Article 61 of the Statute have not been satisfied, the Application for revision founded on the avulsion of the river Goascorán is not admissible.

35. Finally, the Parties raise the question whether the Application for revision was properly made within the six-month time-limit stipulated in paragraph 4 of Article 61 of the Statute. They do acknowledge, however, that the Application was submitted within the ten-year time-limit provided for in paragraph 5 of that Article, specifically, one day before the expiry of that time-limit. Honduras maintains nevertheless that, by proceeding in this fashion, the Applicant showed procedural bad faith. That is denied by El Salvador.

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36. Turning to consideration of El Salvador's submissions concerning the avulsion of the Goascorán, the Chamber recalls that an application for revision is admissible only if each of the conditions laid down in Article 61 is satisfied, and that if any one of them is not met, the application must be dismissed; in the present case, the Chamber will begin by ascertaining whether the alleged facts, supposing them to be new facts, are of such a nature as to be decisive factors in respect of the 1992 Judgment.

37. In this regard, it is appropriate first to recall the considerations of principle on which the Chamber hearing the original case relied for its ruling on the disputes between the two States in six sectors of their land boundary.

According to that Chamber, the boundary was to be determined "by the application of the principle generally accepted in Spanish America of the *uti possidetis juris*, whereby the boundaries were to follow the colonial administrative boundaries" (para. 28). The Chamber did however note that "the *uti possidetis juris* position can be qualified by adjudication and by treaty". It reasoned from this that "the question then arises whether it can be qualified in other ways, for example, by acquiescence or recognition". It concluded that "There seems to be no reason in principle why these factors should not operate, where there is sufficient evidence to show that the parties have in effect clearly accepted a variation, or at least an interpretation, of the *uti possidetis juris* position." (Para. 67.)

Applying these principles to the first sector of the land boundary, the Chamber considered that in this sector "The situation was susceptible of modification by acquiescence in the lengthy intervening period" since the early nineteenth century. It added that, whatever may have been the colonial administrative boundaries, "the conduct of Honduras from 1881 until 1972 may be regarded as amounting to such acquiescence" to a part of the boundary claimed by El Salvador in this sector (para. 80).

38. The Chamber proceeded similarly in paragraphs 306 to 322 of its Judgment in respect of the sixth sector. After having identified the object of the dispute in this sector in paragraph 306, the Chamber first observed "that during the colonial period a river called the Goascorán constituted the boundary between two administrative divisions of the Captaincy-General of Guatemala: the province of San Miguel and the Alcaldía Mayor de Minas of Tegucigalpa" (para. 307). The Parties were in agreement that El Salvador had succeeded in 1821 to the territory of the Province of San Miguel. On the other hand, they disagreed as to whether or not the Alcaldía Mayor of Tegucigalpa had passed to Honduras. The Chamber decided that point in favour of Honduras *(ibid.)*.

The Chamber then considered "The contention of El Salvador that a former bed of the river Goascorán forms the *uti possidetis juris* boundary." In this respect, it observed that:

> "[this contention] depends, as a question of fact, on the assertion that the Goascorán formerly was running in that bed, and that at some date it abruptly changed its course to its present position. On this basis El Salvador's argument of law is that where a

boundary is formed by the course of a river, and the stream suddenly leaves its old bed and forms a new one, this process of 'avulsion' does not bring about a change in the boundary, which continues to follow the old channel." (Para. 308.)

The Chamber added that:

"No record of such an abrupt change of course having occurred has been brought to the Chamber's attention, but were the Chamber satisfied that the river's course was earlier so radically different from its present one, then an avulsion might reasonably be inferred." *(Ibid.)*

Pursuing its consideration of El Salvador's argument, the Chamber did however note: "There is no scientific evidence that the previous course of the Goascorán was such that it debouched in the Estero La Cutú . . . rather than in any of the other neighbouring inlets in the coastline, such as the Estero El Coyol." (Para. 309.)

Turning to consideration as a matter of law of El Salvador's proposition concerning the avulsion of the Goascorán, the Chamber observed that El Salvador "suggests . . . that the change in fact took place in the 17th century" (para. 311). It concluded that "On this basis, what international law may have to say, on the question of the shifting of rivers which form frontiers, becomes irrelevant: the problem is mainly one of Spanish colonial law." (Para. 311.)

At the conclusion of its consideration of El Salvador's line of argument as to the avulsion of the Goascorán, the Chamber did not take any position on the existence of an earlier course of the Goascorán which might have debouched into the Estero La Cutú, or on any avulsion of the river, nor *a fortiori*, on the date of any such avulsion or its legal consequences. It confined itself to defining the framework in which it could possibly have taken a position on these various points.

39. Beginning in paragraph 312 of the Judgment, the Chamber turned to a consideration of a different ground. At the outset, it tersely stated the conclusions which it had reached and then set out the reasoning supporting them. In the view of the Chamber, "any claim by El Salvador that the boundary follows an old course of the river abandoned at some time *before* 1821 must be rejected. It is a new claim and inconsistent with the previous history of the dispute." (Para. 312.)

The Chamber then noted: "A specific assertion that the boundary should follow an abandoned course of the river Goascorán was first made during the Antigua negotiations in 1972" (para. 312). It also quoted an excerpt from the record of the negotiations between the two States at Saco in 1880, stating that the two delegates had agreed "to recognize" the river Goascorán "as the frontier between the two Republics, from its mouth in the Gulf of Fonseca, Bay of La Unión, upstream in a north-easterly direction . . ." *(ibid.)*. The Chamber observed that to interpret "the words 'River Goascorán' [in the text] as meaning a Spanish colonial boundary which in 1821 followed a long-abandoned course of the river, is out of the question" *(ibid.)*. It added that similar considerations applied to the circumstances of further negotiations in 1884 (para. 317).

Having on these grounds arrived at the conclusion that the boundary in 1821 followed the course of the Goascorán at that date, the Chamber turned to consideration of the evidence submitted to it in respect of that course (paras. 313 *et seq.*), evidence which will be examined in due course (see paragraph 50 below).

40. It is apparent from this discussion that, while the Chamber in 1992 rejected El Salvador's claims that the 1821 boundary did not follow the course of the river at that date, it did so on the basis of that State's conduct during the nineteenth century. In other words, applying the general rule which it had enunciated in paragraph 67 of the Judgment, the Chamber proceeded, in paragraph 312, concerning the sixth sector of the land boundary, by employing reasoning analogous to that which it had adopted in paragraph 80 in respect of the first sector. In the sixth sector, this reasoning led the Chamber to uphold the submissions of Honduras, while in the first sector it had proved favourable to El Salvador's position.

In short, it does not matter whether or not there was an avulsion of the Goascorán. Even if avulsion were now proved, and even if its legal consequences were those inferred by El Salvador, findings to that effect would provide no basis for calling into question the decision taken by the Chamber in 1992 on wholly different grounds. The facts asserted in this connection by El Salvador are not "decisive factors" in respect of the Judgment which it seeks to have revised. In light of the 1992 Judgment, the Chamber cannot but reach such a conclusion, independently of the positions taken by the Parties on this point in the course of the present proceedings.

* *

41. In support of its Application for revision, El Salvador relies on a second "new fact", that is, the discovery in the Ayer Collection of the Newberry Library in Chicago of a further copy of the "Carta Esférica" and of a further copy of the report of the expedition of the *El Activo*, thereby supplementing the copies from the Madrid Naval Museum to which the Chamber made reference in paragraphs 314 and 316 of its Judgment (see paragraph 24 above).

El Salvador states that in 1992, the Chamber had before it only copies of the documents that had been obtained from Madrid, and been produced by Honduras. It contends that it was on the basis of those copies that the Chamber decided the "point at which the Goascorán emptied into the Gulf" and the course of the boundary.

According to El Salvador, the documents discovered in Chicago differ from those in Madrid on several significant points. It maintains that:

> "The fact that there are several versions of the 'Carta Esférica' and the Report of the Gulf of Fonseca from the *El Activo* expedition, that there are differences among them and the anachronisms they share, compromises the evidentiary value that the Chamber attached to the documents that Honduras presented, essential in the Judgment [of 1992]."

Further, the evidentiary value is claimed to be all the more doubtful in that the Madrid documents enjoyed no official status and have not been certified to be originals. Accordingly, maintains El Salvador, there exists "a second *new fact*, whose implications for the Judgment have to be considered once the application for revision is admitted".

42. El Salvador adds that "[t]he discovery of hitherto unknown documents is a typical example of the type of fact which lays a case open to revision . . . either because they themselves constitute the *factum* or because they are the source of knowledge of them". It further states that "[e]vidence which rebuts a fact established by a judgment of which revision is sought undoubtedly constitutes a *fact* for purposes of Article 61 of the Statute".

El Salvador asserts that in the present case the fact in question pre-dated the 1992 Judgment but was not "known at the time the Judgment was given". Thus, it is a "new fact" for purposes of Article 61. It is said to be decisive because its discovery has highlighted "the insubstantiality of the Madrid Naval Museum documents" from which the Chamber inferred "such significant" geographical "consequences".

43. Lastly, El Salvador states that the Ayer Collection is "not an indispensable reference source" and that the *El Activo* expedition was not a well-known expedition. It refers in more general terms to the "bitter civil war [which] was raging in El Salvador" "for virtually the whole period between 1980 and the handing down of the Judgment on 11 September 1992". Accordingly, it argues, "El Salvador's ignorance until 2002 of the existence of copies of the *El Activo* documents in collections situated in out-of-the-way places cannot be characterized as 'negligent'".

44. El Salvador concludes from the foregoing that, as the various conditions laid down by Article 61 of the Statute are satisfied, the Application for revision founded on the discovery of the new chart and new report is admissible.

45. For its part, Honduras denies that the production of the documents found in Chicago can be characterized as a new fact. This is simply "another copy of one and the same document already submitted by Honduras during the written stage of the case decided in 1992, and already evaluated by the Chamber in its Judgment". Honduras adds that it "never sought to argue the point whether the spherical chart was an original document (it always spoke of copies) or an official document". But it contends that there are no discrepancies between the three copies of the chart, merely "insignificant differences". Honduras maintains that those differences in no way contradict the content of the logbook. Finally, it notes that all three charts place the mouth of the river Goascorán in its present-day position, a finding on which the 1992 Judgment was based and which in any event remains valid.

46. Honduras further states that the new documents produced by El Salvador were part of a prestigious public collection and have been included in the Newberry Library catalogue at least since 1927. It concludes from this that El Salvador could easily have learned of those documents,

and that it breached its duty of diligence in failing to seek them out or produce them before 1992. According to Honduras, no excuse for this failure can be found in the internal conflict prevailing in El Salvador at the time, as that conflict in no way prevented the conduct of research outside the national territory.

47. Honduras concludes from the foregoing that, as the various conditions laid down by Article 61 of the Statute are not satisfied, the Application for revision founded on the discovery of the new chart and the new report is not admissible.

48. Finally, as regards the conditions laid down in paragraphs 4 and 5 of Article 61 of the Statute, the Parties put forward arguments similar to those they made in respect of the avulsion of the Goascorán (see paragraph 35 above).

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49. The Chamber will proceed, as it did in respect of the avulsion (see paragraph 36 above), to determine first whether the alleged facts concerning the "Carta Esférica" and the report of the *El Activo* expedition are of such a nature as to be decisive factors in respect of the 1992 Judgment.

50. It should be recalled in this regard that the Chamber in 1992, after having held El Salvador's claims concerning the old course of the Goascorán to be inconsistent with the previous history of the dispute, considered "the evidence made available to it concerning the course of the river Goascorán in 1821" (para. 313). It paid particular attention to the chart prepared by the captain and navigators of the vessel *El Activo* around 1796, described as a "Carta Esférica", which Honduras had found in the archives of the Madrid Naval Museum. It noted that the chart

> "appears to correspond with considerable accuracy to the topography as shown on modern maps. It shows the 'Estero Cutú' in the same position as modern maps; and it also shows a river mouth, marked 'R° Goascoran', at the point where the river Goascorán today flows into the Gulf. Since the chart is one of the Gulf, presumably for navigational purposes, no features inland are shown except the '... best known volcanoes and peaks ...' ('... *volcanes y cerros mas conocidos* ...'), visible to mariners; accordingly, no course of the river upstream of its mouth is indicated. Nevertheless, the position of the mouth is quite inconsistent with the old course of the river alleged by El Salvador, or, indeed, any course other than the present-day one. In

> two places, the chart indicates the old and new mouths of a river (e.g., 'Barra vieja del Rio Nacaume' and 'Nuevo Rio de Nacaume'); since no ancient mouth is shown for the Goascorán, this suggests that in 1796 it had for some considerable time flowed into the Gulf where indicated on the chart." (Para. 314.)

The Chamber then analysed the report of the expedition and observed that it also places "the mouth of the river Goascorán at its present-day position" *(ibid.)*.

The Chamber concluded from the foregoing "that the report of the 1794 expedition and the 'Carta Esférica' leave little room for doubt that the river Goascorán in 1821 was already flowing in its present-day course" (para. 316).

51. The Judgment rendered by the Chamber in 1992 is thus based upon certain information conveyed by the "Carta Esférica" and the report of the *El Activo* expedition, in the versions held in Madrid. It should therefore be determined whether the Chamber might have reached different conclusions in 1992 had it also had before it the versions of those documents from Chicago.

52. The Chamber observes in this connection, that the two copies of the "Carta Esférica" held in Madrid and the copy from Chicago differ only as to certain details, such as for example, the placing of titles, the legends, and the handwriting. These differences reflect the conditions under which documents of this type were prepared in the late eighteenth century; they afford no basis for questioning the reliability of the charts that were produced to the Chamber in 1992.

53. The Chamber notes further that the Estero La Cutú and the mouth of the Río Goascorán are shown on the copy from Chicago, just as on the copies from Madrid, at their present-day location. The new chart produced by El Salvador thus does not overturn the conclusions arrived at by the Chamber in 1992; it bears them out.

54. As for the new version of the report of the *El Activo* expedition found in Chicago, it differs from the Madrid version only in terms of certain details, such as the opening and closing indications, spelling, and placing of accents. The body of the text is the same, in particular in the identification of the mouth of the Goascorán. Here again, the new document produced by El Salvador bears out the conclusions reached by the Chamber in 1992.

55. The Chamber concludes from the foregoing that the new facts alleged by El Salvador in respect of the "Carta Esférica" and the report of the *El Activo* expedition are not "decisive factors" in respect of the Judgment whose revision it seeks.

* *

56. Finally, El Salvador contends that proper contextualization of the alleged new facts "necessitates consideration of other facts that the Chamber weighed and that are now affected by the *new facts*". Moreover, El Salvador claims that

> "other evidences and proofs exist that, while not a *new fact*, were not taken up in the proceedings and are useful, even essential, whether to suppiement and confirm the *new facts* or to better understand them".

It cites the great eruption of Cosigüina volcano and the appearance of the Farallones del Cosigüina, the Saco negotiations between 1880 and 1984, and the characteristics of the lower reaches of the river Goascorán.

57. Honduras responds that El Salvador, by submitting for the Chamber's consideration "evidence additional to the alleged new facts", is acting "as though the Court had to ignore its previous reasoning, on the pretext that it is in the light of the context that the existence or non-existence of the alleged new facts falls to be assessed". In the view of Honduras, this approach would be tantamount to expanding "the restrictive list of elements in Article 61, paragraph 1, of the Court's Statute to unheard-of lengths, calculated to turn revision into a habitual method of appeal and to undermine the authority of *res judicata*".

58. The Chamber agrees with El Salvador's view that, in order to determine whether the alleged "new facts" concerning the avulsion of the Goascorán, the "Carta Esférica" and the report of the *El Activo* expedition fall within the provisions of Article 61 of the Statute, they should be placed in context, which the Chamber has done in paragraphs 23 to 55 above. However, the Chamber must recall that, under that Article, revision of a judgment can be opened only by "the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence". Thus, the Chamber cannot find admissible an Application for revision on the basis of facts which El Salvador itself does not allege to be new facts within the meaning of Article 61.

* *

59. Given the conclusions to which it has come in paragraphs 40, 55 and 58 above, it is not necessary for the Chamber to ascertain whether the other conditions laid down in Article 61 of the Statute are satisfied in the present case.

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60. For these reasons,

THE CHAMBER,

By four votes to one,

Finds that the Application submitted by the Republic of El Salvador for revision, under Article 61 of the Statute of the Court, of the Judgment given on 11 September 1992, by the Chamber of the Court formed to deal with the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, is inadmissible.

IN FAVOUR: Judge Guillaume, *President of the Chamber*; *Judges* Rezek, Buergenthal; *Judge* ad hoc Torres Bernárdez;

AGAINST: *Judge* ad hoc Paolillo.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this eighteenth day of December, two thousand and three, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of El Salvador and to the Government of the Republic of Honduras, respectively.

(Signed) Gilbert GUILLAUME,
President of the Chamber.

(Signed) Philippe COUVREUR,
Registrar.

Judge *ad hoc* PAOLILLO appends a dissenting opinion to the Judgment of the Chamber.

(Initialled) G. G.

(Initialled) Ph. C.